IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TAYLOR FAUSNAUGHT, Plaintiff,	:	NO. 19 - 1047
vs.	:	CIVIL ACTION - LAW
UPMC SUSQUEHANNA (FORMERLY SUSQUEHANNA HEALTH) and TASHA KLOCK, Defendants.	:	*Motion to Compel / Motion for Protective Order and to Quash Subpoena / Preliminary Objections*

OPINION & ORDER

AND NOW, following argument held January 6, 2020, on Defendant UPMC Susquehanna's Preliminary Objections and Motion for Protective Order and to Quash Subpoena, and Plaintiff Taylor Fausnaught's Cross-Motion to Compel Attendance and Full Compliance with Notice of Deposition and for the Imposition of Discovery Sanctions, the Court issues the following OPINION & ORDER.

Plaintiff Taylor Fausnaught ("Plaintiff") avers in her Complaint, filed September 9, 2019, that while she was employed as a Residential Assistant at what is now known as the Skilled Nursing & Rehabilitation Center at UPMC Susquehanna ("UPMC"), she had to undertake extensive leave in relation to a highly private, serious medical incident. Plaintiff alleges that a co-worker, Tasha Klock, curious about Plaintiff's extensive absences, made unauthorized access of Plaintiff's medical records using UPMC's SOARIAN program, and then disseminated Plaintiff's confidential medical information to fellow UPMC employees. Plaintiff learned of the unauthorized access upon receipt of a letter sent by UPMC on July 20, 2018, informing Plaintiff that on July 2, 2018, UPMC "discovered that [Plaintiff's] protected health information was inappropriately accessed as the result of employee snooping."[1] This letter was issued pursuant to UPMC's compliance with the notification requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Plaintiff avers that at a subsequent meeting held on July 27, 2018, at UPMC facilities, that UPMC's HIPAA Privacy Officer, David P. Samar, CHPC, informed Plaintiff that UPMC had actual notice of the privacy breach as of June 11, 2018.

Defendant asserts nine (9) separate counts against Defendant UPMC and Defendant Tasha Klock. Plaintiff asserts the following five (5) counts against Defendant UPMC: (I) Negligence, (II) Negligent Supervision, (III) Vicarious Liability for Negligence, (IV) Negligence Per Se, and (V) Violation of the Pennsylvania Unfair

[1] *See* Complaint (Ex. C) (Sept. 9, 2019) ("Complaint").

Trade Practice and Consumer Protection Law ("UTPCPL"). Plaintiff asserts the following four (4) counts against Defendant Tasha Klock: (VI) Tortious Intrusion upon Seclusion, (VII) Negligence, (VIII) Intentional Infliction of Emotional Distress, and (IX) Defamation.

Counsel for Defendants UPMC and Tasha Klock (collectively "Defendants") filed Preliminary Objections to the Complaint on September 30, 2019, alleging various deficiencies in the pleadings. These Preliminary Objections were followed by Defendants filing of a Motion for a Protective Order and to Quash a Subpoena ("Motion for a Protective Order"). In this Motion, Defendants sought relief from various discovery requests, including Plaintiff's alleged attempt to unilaterally schedule the deposition of UPMC HIPAA Privacy Officer, David Samar, and the UPMC Custodian of Records. Defendants further objected to the assertedly overbroad and procedurally deficient discovery requests provided in accompaniment to the subpoenas as "Exhibit A". In response, on October, 29, 2019, Plaintiff filed a Cross Motion to Compel Attendance and Full Compliance with Notice of Deposition and for the Imposition of Pa.R.C.P. 4019 Discovery Sanctions for Failure to Comply with Properly Served Subpoena ("Cross-Motion"). The Court will address the merits of these Motions *seriatim*.

Preliminary Objections

The first ten (10) of Defendants' twelve (12) Preliminary Objections are in the nature of a demurrer. A demurrer asserts the legal insufficiency of a pleading.[2]

Preliminary Objection 1

Defendants' Preliminary Objection 1 in the Nature of a Demurrer requests that the Court dismiss Counts I-VIII on the basis that those claims arise from HIPAA, and that there is no right of private action or relief for HIPAA violations.[3] HIPAA violations

[2] Pa.R.C.P. No. 1028(a)(4); *see also Chorba v. Davlisa Enters., Inc.*, 450 A.2d 36, 38 (Pa. Super. 1982) (citations omitted) ("A demurrer admits all relevant facts pleaded in the complaint and all inferences fairly deducible therefrom, but not conclusions of law. A demurrer may not be sustained unless the complaint evidences on its face that the claim cannot be sustained because the law will not permit recovery. In ruling on a demurrer, a court may not consider factual materials not disclosed on the record. The court, moreover, may not take judicial notice of the record of another case, if not pleaded. If there is any doubt, the doubt should be resolved in favor of overruling the demurrer; summary judgment should be entered only in cases which are clear and free from doubt. Judgment should not be entered against a plaintiff if the pleadings indicate that he could state a better case by amendment.").

[3] Preliminary Objections of Defendants UPMC Susquehanna and Tasha Klock to Dismiss Plaintiff's Complaint ¶¶ 14-15 (Sept. 30, 2019) ("Preliminary Objections") (citing *Dominic v. Wyoming Valley West High School*, 362 F.Supp.2d 560, 573 M.D. Pa. 2005)).

are instead punished through the imposition of civil and criminal penalties against covered entities.[4]

None of Plaintiff's counts directly assert a HIPAA violation. That Plaintiff's claims derive from a breach of privacy that would also constitute a HIPAA violation does not render those claims barred.[5,6] Whether any of Plaintiff's individual claims improperly rely upon HIPAA to create a cause of action will be addressed separately *infra*. Therefore, Defendants' Preliminary Objection 1 is OVERRULED.

Preliminary Objection 2

Defendants' Preliminary Objection 2 in the Nature of a Demurrer requests that the Court dismiss Count IX for Defamation against Ms. Klock on the basis that Plaintiff has failed to plead the necessary elements for defamation. To establish a claim for defamation, Plaintiff must aver:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.[7]

Defendants assert in their Preliminary Objections that truth of a defamatory communication is a defense to defamation.[8] However, Plaintiff in her Brief in Opposition to Defendants' Preliminary Objections correctly identifies that the truth of a

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[4] *Com. v. Williams*, 716 A.3d 298, 318 (Pa. Super. 2017) (citing 42 U.S.C. §§ 1320d–5, 1320d–6).

[5] *See e.g.*, Robichaw v. Horizon House, Inc., Civil Action No. 07-3968, 2008 WL 2152249 (E.D. Pa. May 22, 2008) (dismissing HIPAA violation claim but allowing plaintiff to proceed with claims for defamation and invasion of privacy arising from same incident).

[6] The limitation on asserting violations of HIPAA as separate action largely functions to prevent plaintiffs from bootstrapping state law causes of action into federal jurisdiction. *Cf.* Boone v. Daughtery, Civil Action No. 2:12–cv–1333, 2013 WL 5670876, at *11 n.11 (W.D. Pa. Oct. 15, 2013) (dismissing plaintiff's breach of confidentiality claim on the basis that it was a state law claim that did not provide federal jurisdiction, and further noting that plaintiff could not obtain federal jurisdiction under HIPAA, because HIPAA does not provide a private cause of action); Ball v. D'Addio, Civil No. 1:12–CV–815, 2012 WL 3598412, at *7 (M.D. Pa. July 10, 2012) ("[Plaintiff] may not maintain a private HIPAA claim against these Defendants in federal court arising out of the disclosure of her medical information.") (emphasis added).

[7] 42 Pa.C.S.A. § 8343(a).

[8] 42 Pa.C.S.A. § 8343(b).

statement constitutes an affirmative defense that cannot be raised at the preliminary objection stage, but which must instead be introduced as New Matter.[9,10] Therefore, that the alleged communications were truthful does not justify sustaining a demurrer.

Defendants further argue that the Complaint fails to establish publication because Plaintiff cites two of her former co-workers in the Skilled Nursing Center as the recipients of the defamatory communications, without specifically identifying those co-workers.[11] The Court finds that this general level of identification is sufficient at the pleadings stage.[12]

Defendants next assert that Plaintiff has failed to plead facts to substantiate that the alleged communication was defamatory in character or that the recipient understood the defamatory meaning. The Court will only dismiss a defamation claim on demurrer based on a statement's non-defamatory nature if the court is "certain that the communication is incapable of bearing a defamatory meaning."[13] The Court cannot determine at this preliminary stage that the alleged communications could not bear a defamatory meaning.[14] Additionally, pursuant to the Court Order & Opinion of

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[9] *See* Pa.R.C.P. No. 1030(a); *Pultz v. Whitehead*, 49 Pa. D. & C.3d 444, 451 (Northampton Cty. 1988) ("[T]ruth is an affirmative defense to a claim of defamation. As such, it must be pled as new matter in the answer to the counterclaim and not raised as a demurrer to the counterclaim.").

[10] The Court notes that the procedurally correct method for objecting that Defendants' affirmative defense should have been raised as a new matter would have been for Plaintiff to file her own Preliminary Objections to Defendants' Preliminary Objections. *See Preiser v. Resenzweig*, 614 A.2d 303, 614 A.2d 303, 305 (Pa. Super. 1992) ("Where a party erroneously asserts substantive defenses in preliminary objections rather than to raise these defenses by answer or in new matter, the failure of the opposing party to file preliminary objections to the defective preliminary objections, raising the erroneous defenses, waives the procedural defect and allows the trial court to rule on the preliminary objections."). However, as Plaintiff's objection is preserved on the record within her Brief in Opposition, the Court determines that her failure to file Preliminary Objections does not constitute a waiver.

[11] *See* Complaint ¶¶ 185-86.

[12] *See Petula v. Mellody*, 588 A.2d 103, 107 (Pa. Commw. 1991) (holding that complaint's general allegation that defamatory statements were made to representatives and board members of certain named school district was sufficient to preclude sustaining a demurrer).

[13] *Zartman v. Lehigh County Humane Soc.*, 482 A.2d 266, 269 (Pa. Super. 1984) (quoting *Vitteck v. Washington Broadcasting Co., Inc.*, 389 A.2d 1197, 1201 (Pa. Super. 1978)).

[14] Plaintiff argues within her Brief in Opposition that even if Ms. Klock's communications *were* truthful, and therefore not defamatory under a defamation *per se* construction, such communications would still constitute "defamation by innuendo." The Pennsylvania courts recognize a cause of action for defamation by innuendo in instances when the communications are true, but the insinuations raised by such communications are both defamatory and false. *Menkowitz v. Peerless Publ'ns., Inc.*, 176 A.3d 968, 982 (Pa. Super. 2017), overruled on other grounds 211 A.3d 797 (Pa. 2019). However, a defamation by innuendo claim should be raised separately from a claim for defamation *per se*. Additionally, the Pennsylvania Superior Court has suggested a defamation by innuendo claim would logically preclude a defamation *per se* claim on the basis that Plaintiff would necessarily concede that the relevant communications were factual. *See id.* at 979; *but see ToDay's Hous. v. Times Shamrock Commc'ns, Inc.*, 21 A.3d 1209 (Pa. Super. 2011) (allowing plaintiff to plead both defamation *per se* and defamation by innuendo claims when those claims related to different statements within the same general communication). In summary, while Plaintiff may elect to either re-plead her defamation *per se*

August 20, 2019, Plaintiff is not required to plead with particularity the highly personal, sensitive or potentially embarrassing contents of her medical records.[15] It would be inequitable, in light of the August 20th Order & Opinion, to dismiss Plaintiff's defamation claim simply because certain elements of that claim are pled broadly.

Defendants further argue that the Complaint fails to establish that any communications published by Ms. Klock were defamatory *per se*. Defamation *per se* is applicable in instances when the communications ascribe to the plaintiff any of the following: "commission of a criminal offense, a loathsome disease, serious sexual misconduct, or conduct or characteristics that adversely affect the plaintiff's fitness to properly conduct his profession, trade or business."[16] The Court is satisfied that the Complaint sufficiently avers communications that could reasonably impute serious sexual misconduct or characteristics that could adversely affect Plaintiff's fitness to conduct her business, trade, or profession. As Plaintiff has made out a *prima facie* claim for defamation *per se*, she is not required to provide proof of special harm.[17] Finally, as the privileged character of a communication is an affirmative defense that must first be proven by Defendants,[18] Plaintiff's Complaint is not deficient for failing to establish an abuse of a conditionally privileged occasion.

Based on the forgoing reasoning, Defendants' Preliminary Objection 2 is OVERRULED.

Preliminary Objection 3

Defendants' Preliminary Objection 3 in the Nature of a Demurrer requests that the Court dismiss Count I for Negligence against UMPC on the basis that Plaintiff's Complaint fails to establish a duty on behalf of UPMC except as by citation to HIPAA, which, as previously discussed, does not provide for a private cause of action. Plaintiff counters in her Brief in Opposition that the Pennsylvania Supreme Court has established an applicable common law duty of care in *Dittman v. UPMC*. In *Dittman*, hackers breached UPMC's internet accessible computer system, retrieving confidential

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claim in an Amended Complaint or plead the defamation by innuendo claim raised in her Brief in Opposition, she may not plead both claims as one claim necessarily precludes the other.

[15] *See* Opinion & Order, CV-19-1047; Motion to Seal (Aug. 20, 2019) (denying Plaintiff's uncontested Motion to File Complaint Under Seal and to Seal Judicial Record).

[16] *Krolczyk v. Goddard Sys., Inc.*, 164 A.3d 521, 531 (Pa. Super. 2017) (citing Restatement 2d of Torts, § 570).

[17] *See Joseph v. Scranton Times L.P.*, 959 A.2d 322, 344 (Pa. Super. 2008) (citing *Brinich v. Jencka*, 757 A.2d 388, 397 (Pa. Super. 2000)) ("With words that are actionable per se, only general damages, i.e., proof that one's reputation was actually affected by defamation or that one suffered personal humiliation, or both, must be proven; special damages, i.e., out-of-pocket expenses borne by the plaintiff due to the defamation, need not be proven.").

[18] 42 Pa.C.S.A. § 8343(b)(2).

UPMC employee information stored in that system. The Supreme Court held that UPMC employees could assert a common law negligence claim against UMPC, stating that, "in collecting and storing Employees' data on its computer systems, UPMC owed Employees a duty to exercise reasonable care to protect them against an unreasonable risk of harm arising out of that act."[19] While the facts of *Dittman* are not entirely on point, it is relevant for the proposition that an actor's affirmative conduct places a duty upon that actor to protect others against an unreasonable risk of harm arising from that conduct.[20] It is alleged UPMC placed Plaintiff's medical records on SOARIAN and allowed Ms. Klock and other UPMC employees full access to that program. This may be fairly construed as affirmative conduct giving rise to a duty of care.

However, while Plaintiff may validly assert a Negligence claim against UPMC pursuant to the facts alleged, she may not do so pursuant to HIPAA. Plaintiff's Count I makes reference to UPMC as a "health care provider" under HIPAA, and states that UPMC had a duty to protect Plaintiff's health care records pursuant to the Privacy Rule and Administrative Simplification rules contained within HIPAA.[21] Plaintiff may not support her Negligence claim by citing duties established under HIPAA. While the Complaint generally references UPMC's "standard of care and duty of conduct" owed to Plaintiff,[22] it is not sufficiently clear in explicating that this duty would arise under the common law. Therefore, Defendants' Preliminary Objection 3 is SUSTAINED.

Preliminary Objection 4

Defendants' Preliminary Objection 4 in the Nature of a Demurrer requests that the Court dismiss Count II for Negligent Supervision against UMPC on the basis that Plaintiff's Complaint fails to establish a *prima facie* case for Negligent Supervision. Negligent Supervision creates employer liability in situations "where the employer fails to exercise ordinary care to prevent an intentional harm to a third-party which (1) is committed on the employer's premises acting outside the scope of his employment and (2) is reasonably foreseeable."[23] "A harm is foreseeable if it is part of a general type of injury that has a reasonable likelihood of occurring."[24]

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[19] *Dittman v. UPMC*, 196 A.3d 1036, 1044 (Pa. 2018).
[20] *See Feleccia v. Lackawanna College*, 21 A.3d 3, 14 (Pa. 2019) ("[I]n scenarios involving an actor's affirmative conduct, he is generally under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.") (quoting *Dittman*, 196 A.3d at 1046) (citations omitted).
[21] *See* Complaint ¶¶ 68-70.
[22] Complaint ¶ 72.
[23] *Mullen v. Topper's Salon and Health Spa., Inc.*, 99 F.Supp.2d 553, 556 (E.D. Pa. 2000) (applying Pennsylvania law).
[24] *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 491 (3d Cir. 2013).

Additionally, the plaintiff must demonstrate that the employer knew or should have known that the employee was "dangerous, careless or incompetent and such employment might create a situation where the employee's conduct would harm a third person."[25] To establish that an employer had knowledge or notice of the employee's harmful propensity involves a two-part analysis: "(1) what was the employee's conduct prior to the incident in question, and was it of such a nature that would indicate a propensity for [the type of harm committed]; and (2) did the employer know or, in the exercise of reasonable care, should it have known of the employee's prior conduct?"[26] Plaintiff's Complaint does not plead facts indicating that Ms. Klock had previously undertaken any action that would have put UPMC on notice that she had a propensity for invading the privacy of others. Therefore, Plaintiff's Preliminary Objection 4 is SUSTAINED.

Preliminary Objection 5

Defendants' Preliminary Objection 5 in the Nature of a Demurrer requests that the Court dismiss Count III for Vicarious Liability against UPMC on the basis that Plaintiff has failed to state any claim against Tasha Klock and, therefore, there is no basis upon which to hold UPMC vicariously liable. However, as provided *infra*, the Court finds that Plaintiff has successfully asserted multiple claims against Ms. Klock. Therefore, Defendants' Preliminary Objection 5 is OVERRULED.

Preliminary Objection 6

Defendants' Preliminary Objection 6 in the Nature of a Demurrer requests that the Court dismiss Count IV for Negligence *Per Se* against UPMC on the basis that Plaintiff's negligence *per se* claim is predicated on UPMC's violation of the HIPAA Privacy Rule. "The concept of negligence *per se* establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm."[27] The party asserting negligence *per se* must further prove that the negligence was the "proximate and efficient cause of the injury in question."[28]

That a statute does not create a private cause of action does not, in itself, necessarily bar the statute from supporting a negligence *per se* claim. While the

[25] *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 39-30 (Pa. Super. 2000) (citing *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968)); *see also* Restatement 2d of Torts, § 317.
[26] *Heller v. Patwil Homes, Inc.*, 713 A.2d 105, 108 (Pa. Super. 1998) (quoting *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418, 422 (Pa. 1968)).
[27] *Cabiroy v. Scipione*, 767 A.2d 1078, 1079 (Pa. Super. 2001) (emphasis added).
[28] *Id.*

Pennsylvania courts have recognized that the "absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm," such absence is only one factor to consider and "does not necessarily preclude [the statute's] use as the basis of a claim of negligence per se."[29] However, this Court must also consider that HIPAA's enforcement "lies within the exclusive province of the Secretary of Health and Human Services."[30] With the Secretary of Health and Human Services granted exclusive authority to enforce HIPAA's statutory scheme, this Court believes it would be overstepping its bounds by adjudicating Plaintiff's negligence *per se* claim.[31] Therefore, Defendants' Preliminary Objection 6 is SUSTAINED.

Preliminary Objection 7

Defendants' Preliminary Objection 7 in the Nature of a Demurrer requests that the Court dismiss Count V for violation of the UTPCPL against UPMC on the basis that Plaintiff has failed to plead the necessary elements for a violation of the UTPCPL. The UTPCPL prohibits a business from "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding."[32] Plaintiff's Complaint avers that UPMC violated the UTPCPL by its failure to "immediately" notify her of the privacy breach, in contradiction of UPMC's Notice of Privacy Practices, which were provided to Plaintiff prior to treatment.[33]

UPMC allegedly learned of the privacy breach on June 11, 2018, but did not notify Plaintiff until July 20, 2018, some thirty-nine (39) days later. However, from the plain language of UPMC's Notice of Privacy Practices, attached as Exhibit F to Plaintiff's Complaint, there was no assurance of immediate notification.[34] Instead, the

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[29] McCain v. Beverly Health & Rehab. Servs., No. CIV.A. 02-657, 2002 WL 1565526, at *1 (E.D. Pa. July 15, 2002) (quoting Fallowfield Dev. Corp. v. Strunk, CIV.A. No. 89-8644, 1990 WL 52745, at *19 (E.D. Pa. April 23, 1990)).

[30] *See* Hahn v. Loch, No. 2984 EDA 2014, 2016 WL 5172451, at *1 n.2 (Pa. Super. July 13, 2016) (citing Jackson v. Mercy Behavioral Health, Civil No. 14–1000, 2015 WL 401645, at *3 (W.D. Pa. Jan. 28, 2015)); *see also* 42 USCA § 1320d-5(d) (providing that that Secretary of Health and Human Services enforces HIPAA and limiting enforcement at the state level solely to actions brought by the state attorney general).

[31] *See e.g.*, *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 496-97 (Mercer Cty. 2002) (citing *Chalfin v. Beverly Enters., Inc.*, 741 F.Supp. 1162 (E.D. Pa. 1989)) (holding that plaintiff could not bring a negligence *per se* claim pursuant to the Pennsylvania Health Care Facilities Act (PHCFA) because the enforcement of the PHCFA was reserved to the exclusive jurisdiction of the Pennsylvania Department of Health).

[32] 73 Pa.C.S.A. § 201-2(4)(xxi).

[33] *See* Complaint ¶ 127.

[34] The Court notes that Plaintiff's attachment of UPMC's Notice of Privacy Practices as an exhibit and reference to that Notice within the Complaint in support of the UTPCPL claim renders the Notice a part of the pleadings. *See Framlau Corp. v. Delaware County*, 299 A.2d 335, 336 (Pa. Super. 1972) (finding that plaintiff's attachment of construction contract and to the complaint as an exhibit, coupled with the

subsection of UPMC's Notice of Privacy Practices titled "Violation of Privacy Rights" states: "In the event that a breach of your protected health information occurs by UPMC or one of its business associates, you will be provided with written notification as provided by law."[35] This clause does not support the Complaint's allegation that UPMC's Notice of Privacy Practices were deceptive or created a reasonable expectation of immediate notification.

Additionally, Plaintiff's Complaint alleges that the Notice of Privacy required that UPMC immediately provide Plaintiff with a list of individuals who had received or accessed her health information upon request.[36] However, Section 3(a) of UPMC's Notice of Privacy Practices, titled "Right to Ask for an 'Accounting of Disclosures'" states that an individual's request for accounting must be "in writing."[37] Plaintiff counters in her Brief in Opposition that Section 3(b) of UPMC's Notice of Privacy Practices, which is specifically limited to the accounting of "Information That Is Maintained Electronically," does not contain the "in writing" language. However, as Section 3(a) applies to requests for accounting of disclosures "Generally" the Court finds that a reasonable reading of the clauses in tandem supports the conclusion that all requests for accounting of disclosures would need to be in writing. Any distinction relating to the accounting of electronically maintained records is limited to the applicable term of the accounting period, as expressly provided under Section 3(b).[38] The Court finds this the most reasonable interpretation of UPMC's Notice of Privacy, as UPMC would, as a matter of course, need to retain a documentary record of such requests. Pursuant to the foregoing reasoning, Defendants' Preliminary Objection 7 is SUSTAINED.

Preliminary Objection 8

Defendants' Preliminary Objection 8 in the Nature of a Demurrer requests that the Court dismiss Count VI for Tortious Intrusion upon Seclusion against Tasha Klock on the basis that Plaintiff has failed to plead the necessary elements for tortious

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complaint's reference to that contract in support of a plaintiff's claim for breach, rendered the contract document a part of the pleadings).

[35] Complaint (Ex. F pg. 8). HIPAA regulations require that a covered entity must provide notice "without unreasonable delay and in no case later than 60 calendar days after discovery of a breach." 45 CFR § 164.404(b).

[36] See Complaint ¶¶ 128, 134.

[37] Complaint (Ex. F pg. 7).

[38] Specifically, accounting of disclosures for electronically maintained information is limited to a term of three years, while accounting for all other information spans a term of six years.

intrusion upon seclusion.[39] An intrusion upon seclusion occurs when an individual "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."[40] To be highly offensive, an intrusion must be egregious to the point that would cause "mental suffering, shame or humiliation to a person of ordinary sensibilities."[41] Even an intrusion upon a plaintiff's private medical records or diagnosis is not *per se* so highly offensive as to necessarily constitute an intrusion upon seclusion.[42] However, the Court finds that pursuant to the facts alleged, Plaintiff has made out a *prima facie* case that Ms. Klock's intrusion would be highly offensive to a reasonable person. Therefore, Defendants' Preliminary Objection 8 is OVERRULED.

Preliminary Objection 9

Defendants' Preliminary Objection 9 in the Nature of a Demurrer requests that the Court dismiss Count VII for Negligence against Tasha Klock on the basis that Plaintiff has failed to plead the necessary elements for negligence. To establish a common law claim for negligence, Plaintiff must establish four elements: "(1) the defendant had a duty to conform to a certain standard of conduct; (2) the defendant breached that duty; (3) such breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage."[43] As indicated by Plaintiff in her Brief in Opposition, the Court will presume the existence of a duty when the alleged harm derives from the defendant's affirmative, risk-causing conduct.[44] Additionally, Plaintiff's averment that Ms. Klock shared Plaintiff's private health information with UPMC co-workers is sufficient to allege a breach of duty. All well-pled, material facts will be taken as true when ruling upon a demurrer.[45] Therefore, Defendants' Preliminary Objection 9 is OVERRULED.

Preliminary Objection 10

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[39] For the purposes of clarity, Defendants refer to this claim in their Preliminary Objections as a tortious invasion of privacy, which is an umbrella term that encompasses claims for tortious intrusion upon seclusion.
[40] *Chicarella v. Passant*, 494 A.2d 1109, 1114 (Pa. Super. 1985) (quoting Restatement 2d of Torts, § 652B).
[41] *Id.* (quoting *Hull v. Curtis Publ'g Co.*, 125 A.2d 644, 646 (Pa. Super. 1956)) (citations omitted).
[42] *Id.* (citing *Nagy v. Bell Telephone Co.*, 436 A.2d 701 (Pa. Super. 1981)).
[43] *Pyeritz v. Com.*, 32 A.3d 687, 692 (Pa. 2011) (citing *Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 27 (2006)).
[44] *See Dittman*, 196 A.3d at 1046.
[45] *White v. Kreithen*, 644 A.2d 1262, 1264 (Pa. Super. 1994).

Defendants' Preliminary Objection 10 in the Nature of a Demurrer requests that the Court dismiss Count VIII for Intentional Infliction of Emotional Distress against Tasha Klock on the basis that Plaintiff has failed to plead the necessary elements for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a party must demonstrate "extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress to another."[46] The standard of evidence for intentional infliction of emotional distress is a high one, and the Pennsylvania Supreme Court requires that any such claim be supported by "competent medical evidence," even at the pleadings stage.[47] The Complaint's allegation that Ms. Klock's actions have caused Plaintiff to experience "mental suffering, anxiety, anguish, distress, stress, sleeplessness, humiliation, loss of familial relations and loss of reputation"[48] are insufficient to meet the high pleading standard required for an intentional infliction of emotional distress claim, as these allegations are unsupported by competent medical evidence. Therefore, Defendants' Preliminary Objection 10 is SUSTAINED.

Preliminary Objection 11

Defendants' Preliminary Objection 11 in the Nature of a Motion to Strike requests that the Court strike Plaintiff's request for the imposition of punitive damages, which are included with every count of the complaint, as she has failed to plead facts demonstrating an evil motive or reckless indifference to the rights of others.[49] A court may award punitive damages for outrageous conduct this is "malicious, wanton, reckless, willful, or oppressive. In determining whether punitive damages should be awarded, the act itself together with all the circumstances including the motive of the wrongdoer and the relations between the parties should be considered."[50] The Court

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[46] *Taylor v. Albert Einstein Med. Cent.*, 754 A.2d 650, 652 (Pa. 2000) (quoting Restatement 2d of Torts, § 46(2)).

[47] *See Kazatsky v. King David Memorial Park*, 527 A.2d 988, 995 (Pa. 1987); *see also* Wertz v. Susquehanna Gastroenterology Ass'c., Ltd., No. 12-02811, 2013 WL 4764515, at *1 (Lyco. Cty. Aug. 27, 2013) (holding that, for an intentional infliction of emotional distress claim to survive preliminary objections, the alleged injury must be supported by competent medical evidence and cannot be a mere averment that defendant suffered from physical and/or mental injuries).

[48] Complaint ¶ 175.

[49] *See Slappo v. J's Dev. Assoc., Inc.*, 791 A.2d 409, 417 (Pa. Super. 2002) (quoting *Bannar v. Miller*, 701 A.2d 232, 242 (Pa. Super. 1997) (citations omitted)) ("It is well settled that punitive damages will lie only in cases of outrageous behavior, where defendant's egregious conduct shows either an evil motive or reckless indifference to the rights of others. Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct.").

[50] *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963) (citing Restatement of Torts, § 908 comment e).

finds that Plaintiff has failed to plead facts supportive of a finding that UPMC's behavior was, in fact, outrageous, or otherwise exceeded mere negligence.[51] However, the Court cannot, free from doubt, similarly hold that the Complaint's averment that Ms. Klock accessed Plaintiff's private medical records without authorization and then disseminated highly confidential information would not constitute outrageous conduct. Therefore, Defendants' Preliminary Objection 11 is SUSTAINED as to those counts applicable to Defendant UPMC. Defendants' Preliminary Objection 11 is OVERRULED as to those counts applicable to Defendant Tasha Klock.

Preliminary Objection 12

Defendants' Preliminary Objection 12 in the Nature of a Motion to Strike requests that the Court strike paragraphs 46, 51, 56, 64, 74, 85, 87, 92, 93, 99, 100, 111, 112, 115, 119, 120, 124, 127, 128, 134, 135, 136, 153, 157, 158, 170, 171, 176, 182, 184, 187, 188, and 189 of the Complaint for failure to clearly and concisely plead the material facts upon which the Complaint is based.[52] Defendants provide in their Preliminary Objections that these paragraphs should be stricken because the Courts disfavor "vague and all-inclusive language."[53] Objections to overly broad language in a pleading may be filed either as a preliminary objection in the nature of a request for a more specific pleading or as a motion to strike that portion of the Complaint.[54]

The Court first notes that Defendants' objections to paragraphs 111, 112, 119, and 120, included within Plaintiff's Count IV for Negligence *Per Se*, and Defendants' objections to paragraphs 124, 127, 128, 134, and 135, and 136, included within Plaintiffs' Count V for violation of the UTPCPL, have been RENDERED MOOT by the forgoing Order. Defendants' objections to paragraphs 46, 51, 56, 64, 74, 85, 87, 92, 93, 100, 157, 158, 170, 171, 176, 187, 188, and 189 are SUSTAINED on the basis that those paragraphs include excessively vague and equivocal language not properly directed to putting Defendants' on full notice of Plaintiff's claims.[55] Additionally, the Court holds that paragraph 157 is deficient as it avers a breach of duty owed to

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[51] *See* Toman v. Waste Mgmt., Inc., No. 2003-CV-964, 2005 WL 2838236, at *2 (Lackawanna Cty. Oct. 21, 2005) ("When seeking punitive damages, the plaintiff must plead facts that are different than ordinary negligence or even gross negligence.").
[52] *See* Pa.R.C.P. No. 1019(a) ("The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.").
[53] *Flurer v. Pocono Med. Ctr.*, 15 Pa. D. & C.4th 645, 671 (Monroe Cty. 1992) (citing *Connor v. Allegheny Gen. Hosp.*, 461 A.2d 608 (Pa. 1983) ("It is well-established that Pennsylvania courts view. . . vague and all-inclusive language with disfavor.").
[54] *Connor v. Allegheny Gen. Hosp.*, 461 A.2d at 602 n.3.
[55] Such language includes: "*inter alia*," "and/or," "believes and therefore avers," "including but not limitied to," and "upon information and belief."

Plaintiff by Defendant UPMC under Count VII for Negligence, when Count VII is directed at Defendant Tasha Klock. The Court further holds that Defendants' objection to paragraph 182 is SUSTAINED because that paragraph's reference to Ms. Klock's abuse of a conditionally privileged position is not otherwise expounded upon within the Complaint and is not a necessary element of Plaintiff's claim under Count IX for Defamation, as discussed *supra*. Defendants' objections to paragraph 99, 153, and 184 are OVERRULED, as the Court finds these paragraphs are sufficiently concise and detailed as to provide Defendants notice as to Plaintiff's claims.

Motion of Defendants for a Protective Order and to Quash a Subpoena / Plaintiff's Cross-Motion to Compel Attendance and Full Compliance with Notices of Deposition and for the Imposition of Pa.R.Civ.P. 4019 Discovery Sanctions for Failure to Comply with Properly Served Subpoena

On September 19, 2019, Plaintiff's counsel emailed Defendants' counsel, inquiring about the availability of UPMC employee David Samar to attend a deposition. Plaintiff's counsel provided three potential dates for the deposition to be conducted: October 21, 2019, October 22, 2019, or October 23, 2019. After receiving a follow-up request for response, on September 23, 2019, Defendants' counsel sent a responsive email stating that Defendants would not answer requests for discovery while Preliminary Objections remained pending, in accordance with local practice. Plaintiff's counsel countered via responsive email that no extant local rule precluded the scheduling of a deposition while Preliminary Objections remain pending.[56] On September 30, 2019, Plaintiff's counsel served Defendants' counsel with a notice of deposition, unilaterally scheduling the deposition of David Samar for October 22, 2019, at the Lycoming County Courthouse. The Notice of Deposition required that Mr. Samar provide the discovery documents requested in an attached "Exhibit A" at the time of deposition.[57] "Exhibit A" sought:

1. All Electronically Stored Information ("ESI") relating to UPMC's discovery that Defendant Tasha Klock accessed Plaintiff's protective health information including but not limited to documentation of Plaintiff's medical files/records that were accessed by Defendant Tasha Klock.
2. Copies of all communications (including but not limited to notes, emails, correspondence, text message and I-Messages) sent by or sent by David

[56] *See* Plaintiff's Cross-Motion to Compel Attendance and Full Compliance with Notices of Deposition and for the Imposition of Pa.R.Civ.P. 4019 Discovery Sanctions for Failure to Comply with Properly Served Subpoena (Ex. A) (Oct. 29, 2019).
[57] *See* Motion of Defendants for a Protective Order and to Quash a Subpoena (Ex. A) (Oct. 17, 2019) ("Motion for a Protective Order").

Samar regarding Defendant Tasha Klock's access of Plaintiff's protected health information.

3. A complete record of all communications (including but not limited to notes, emails, correspondence, and disciplinary reports) between Defendant UPMC and Defendant Tasha Klock regarding her improper access of Defendant UPMC's computers.
4. Copies of all communications received from and sent to Department of Health and Human Services, Office of Civil Rights regarding Plaintiff.
5. Copies of all communications (including but not limited to notes, emails, correspondence, text message and I-Messages) exchanged by and between David Samar and Rachel Barto, R.N.
6. A complete list of all incidents of improper access of UPMC's patients confidential health information at UPMC Susquehanna Health facility in the past ten (10) years and resulting action(s) taken by the Department of Health and Human Services, Office for Civil Rights.
7. A complete list of all incidents of improper access of UPMC's patients confidential health information at UPMC Susquehanna Health facility in the past ten (10) years and resulting disciplinary action(s) taken by UPMC.

Defendants' counsel thereafter mailed a letter to Plaintiff's counsel on October 9, 2019 stating that counsel would be unavailable on October 22, 2019, and further asserting that the discovery requests and subpoena were objectionable. Specifically, Defendants' counsel objected on the basis that the discovery requests attached to the notice of subpoena were,

> overly broad, vague, unduly burdensome and would require the witness to conduct an unreasonable investigation. In addition, they seek information which is irrelevant and unlikely to lead to the production of admissible evidence; information protected by the Attorney-Client Privilege and/or Attorney Work Product Doctrine, or otherwise confidential; and the requests are beyond the scope of permissible discovery pursuant to the Pennsylvania Rules of Civil Procedure.[58]

Defendants' counsel further objected that the requests improperly sought discovery from a party, namely UPMC Susquehanna, rather than a witness, and were therefore lodged outside the appropriate procedures provided under Pa.R.C.P.

[58] Motion for a Protective Order (Ex. B).

4009.1.[59] Defendants' counsel additionally asserted that the Notice of Video Deposition failed to comply with Pa.R.C.P. 4017.1 by failing to disclose the name, address, and employer of the video operator.[60] On October 16, 2019, Plaintiff's counsel responded by letter, countering that Defendants' counsel's objections to the deposition and discovery requests were not supported by law, and stating counsel's intention to proceed with the October 22nd deposition. The October 16th letter included a revised Notice of Video Deposition identifying the video operator in compliance with Pa.R.C.P. 4017.1, and further included a subpoena for the attendance of UPMC's Record Custodian at the October 22nd deposition, in case Mr. Samar should lack access to any of the documents listed under "Exhibit A."[61]

The Court will first confirm that Plaintiff is not precluded from taking an oral deposition while preliminary objections remain pending.[62] However, Plaintiff may not subpoena documents in the possession of an opposing party, namely UPMC.[63] As indicated by Defendants' counsel in the Motion for a Protective Order, if Plaintiff seeks discovery to be delivered at the time of deposition, notice of the request must comply with Pa.R.C.P. 4009.1, *et seq.*[64] The procedurally correct method for Plaintiff to request the documents listed in "Exhibit A" would be to serve a request upon UPMC, not to serve a subpoena duces tecum upon Mr. Samar, who does not need to be subpoenaed as a current employee of a UPMC.[65] Thereafter, UPMC would have thirty

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[59] Pa.R.C.P. 4009.1(a) ("Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 or a subpoena upon a person not a party pursuant to Rules 4009.21 through 4009.27 to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and electronically stored information), or to inspect, copy, test or sample any tangible things or electronically stored information, which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served, and may do so one or more times.").

[60] *Id.*

[61] Motion for a Protective Order (Ex. C).

[62] Pursuant to Pa.R.C.P. 4007.2(a)-(b), a plaintiff is permitted to take a deposition without leave of court so long as the notice schedules taking of the deposition more than thirty (30) days after service of original process. *See also* Pa.R.C.P. 4007.3 ("Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.").

[63] UPMC will be subject to discovery for documents in its "possession, custody, or control." *See e.g.*, *Barkeyville Borough v. Stearns*, 35 A.3d 91, 93 (Pa. Commw. 2012) (holding that Barkeyville Borough was obligated to satisfy discovery requests for documents within their possession, custody, or control).

[64] Pa.R.C.P. 4007.1(d).

[65] *See* Pa.R.C.P. 4009.11. Issuance of a subpoena duces tecum may be appropriate for obtaining information retained solely in the possession of former employees of a party, but not current employees. *See e.g.*, *Barley v. Consol. R.R. Corp.*, 820 A.2d 740 (Pa. Super. 2003) (holding that trial court had erred in requiring defendant railroad company to produce two former employees for deposition, along with documents identified in the notices of deposition, as employees were not in railroad's control and

(30) days to serve objections to each numbered paragraph in the request, and produce and make available those documents to which there is no objection.[66]

Finding that Plaintiff's issuance of a subpoena did not comply with the Rules of Civil Procedure, Defendants' Motion for a Protective Order and to Quash a Subpoena is GRANTED. Plaintiff's Cross-Motion is DENIED. As both parties have failed to fully comply with the civil rules of discovery, the Court declines to issue sanctions. The Court will not address UPMC's objections to the content of "Exhibit A" as Plaintiff has not properly served this discovery request upon UPMC, nor has UPMC provided specific objections to each request in the manner provided *supra*. Plaintiff may hereafter reschedule the deposition of David Samar or the UPMC Record Custodian, subject to reasonable notice.

Conclusion

In summary, Defendants' Preliminary Objection 1 in the Nature of a Demurrer requesting the dismissal of Counts I-VIII is OVERRULED. Defendants' Preliminary Objection 2 in the Nature of a Demurrer requesting dismissal of Count IX for Defamation is OVERRULED. Defendants' Preliminary Objection 3 in the Nature of a Demurrer requesting dismissal of Count I for Negligence against UMPC is SUSTAINED. Defendants' Preliminary Objection 4 in the Nature of a Demurrer requesting dismissal of Count II for Negligent Supervision is SUSTAINED. Defendants' Preliminary Objection 5 in the Nature of a Demurrer requesting dismissal of Count III for Vicarious Liability is OVERRULED. Defendants' Preliminary Objection 6 in the Nature of a Demurrer requesting dismissal of Count IV for Negligence *Per Se* is SUSTAINED. Defendants' Preliminary Objection 7 in the Nature of a Demurrer requests dismissal of Count V for violation of the UTPCPL is SUSTAINED. Defendants' Preliminary Objection 8 in the Nature of a Demurrer requesting dismissal of Count VI for Tortious Intrusion upon Seclusion is OVERRULED. Defendants' Preliminary Objection 9 in the Nature of a Demurrer requesting dismissal of Count VII for Negligence against Tasha Klock is OVERRULED. Defendants' Preliminary Objection 10 in the Nature of a Demurrer requesting dismissal of Count VIII for Intentional Infliction of Emotional Distress is SUSTAINED.

Defendants' Preliminary Objection 11 in the Nature of a Motion to Strike Plaintiff's requests for punitive damages is SUSTAINED as to the counts applicable to Defendant UPMC and OVERRULED as to the counts applicable to Defendant Tasha Klock. Defendants' Preliminary Objection 12 in the Nature of a Motion to Strike for

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were not parties to the action; proper procedure would have been for plaintiff to issue subpoenas duces tecum upon employees).

[66] *See* Pa.R.C.P. 4009.12.

failure to plead material facts is SUSTAINED as to paragraphs 46, 51, 56, 64, 74, 85, 87, 92, 93, 100, 157, 158, 170, 171, 176, 182, 187, 188, and 189, OVERRULED as to paragraphs 99, 153, and 184, and DISMISSED AS MOOT as to paragraphs 111, 112, 119, 120, 124, 127, 128, 134, and 135, and 136.

Plaintiff shall have twenty (20) days from the issuance of this Order to file an Amended Complaint addressing the deficiencies in the Complaint.

Defendants' Motion for a Protective Order and to Quash a Subpoena is GRANTED. Plaintiff's Cross-Motion is DENIED. The parties shall bear their own costs.

IT IS SO ORDERED this 4th day of March 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp

cc: Austin White, Esq.
Paige Macdonald-Matthes, Esq.
200 Locust St., Ste. 400, Harrisburg, PA 17101
Gary Weber, Esq. (Lycoming Reporter)